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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

versus

STATE REVENUE COMMISSION, *et al.*,
Appellees.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

I. THE OPINION OF THE COURT BELOW.

The opinion in this case by the Supreme Court of Georgia, rendered June 17, 1938, is reported under the style of *Dixie Ohio Express Company v. State Revenue Commission, et al.*, 186 Ga. —, 197 S. E. 887.

II. JURISDICTION.

The jurisdiction of this court has been discussed in the statement as to jurisdiction filed in compliance with Rule 12. The facts stated hereinafter show a substantial Federal question and the Supreme Court of Georgia held that the statute involved did not violate either the commerce clause or the equal protection clause of the Constitution of the United States (see Opinion, R. 26). Jurisdiction on appeal is supported by decisions of this court in which the jurisdictional facts were similar. *Interstate Transit Com-*

pany v. Lindsey, 283 U. S. 183; *Sprout v. The City of South Bend*, 277 U. S. 163.

III. STATUTE INVOLVED.

The statute involved is the Maintenance Tax Act of 1937, Georgia Laws, 1937, page 155, the material parts of which are set out in the Appendix hereto.

IV. STATEMENT OF THE CASE.

The State Revenue Commission issued a fi. fa. against Dixie Ohio Express Company and caused the same to be levied on a two-ton truck of the appellant. The fi. fa. was issued for the amount of a license fee alleged to be due under the Maintenance Tax Act of 1937 (R. 1, 2). Appellant filed an affidavit of illegality to the levy and gave bond for the eventual condemnation money (R. 3). The Revenue Commission filed a general demurrer to the affidavit which the trial court sustained and ordered the affidavit dismissed (R. 26). This ruling was affirmed by the Supreme Court of Georgia. The affidavit being dismissed on demurrer, the allegations therein must be considered to be true and a summary of the material parts thereof is set out hereinafter.

Dixie Ohio Express Company is an Ohio corporation with its principal office and place of business in that State. It is engaged in transporting property by motor vehicle as a common carrier for hire between points in the States of Ohio, Pennsylvania, New York, Kentucky, Tennessee, Alabama and Georgia. Appellant is engaged only in interstate commerce and does no intrastate commerce whatsoever (R. 3, 4). In operating over the highways of Georgia its trucks do not travel over any of the Rural Post Roads of Georgia as defined in the Act of March 18, 1937, with respect to Rural Post Roads. Georgia Laws, 1937, page 912 at page 914. The appellant's trucks are operated entirely over State Aid Highways composing the State Highway System. Pursuant to Section 206 of the Federal Motor

Carrier Act of 1935 the Dixie Ohio Express Company has been issued a certificate by the Interstate Commerce Commission which limits its operations to these particular highways and under its certificate the appellant is not entitled to operate over the Rural Post Roads of Georgia (R. 9).

The Maintenance Tax Act allocates the entire proceeds of the fees collected thereunder to the maintenance and construction of Rural Post Roads (R. 9, 10).

The appellant owns approximately one hundred pieces of equipment, consisting of 1½-ton and 2-ton straight trucks and 1½-ton and 2-ton tractors which are used to pull trailers, each weighing approximately 4,000 pounds. The appellant has purchased a $3.00 license tag and a $25.00 Georgia Public Service tag for each truck and a $2.00 for hire chauffeur's license for each of the drivers. The appellant has paid in addition to these taxes a State tax of six cents per gallon for each gallon of gasoline purchased in the State of Georgia and its purchases amount to approximately 90,000 gallons per year (R. 8, 9). For convenience, the parties agreed to deposit all moneys alleged to be due under the Act in escrow pending the outcome of this action. For this reason, the entire operations of the appellant are to be considered. In accordance with the agreement, appellant has deposited approximately $4,000.00, which amount is equal to the fees alleged to be due under the Maintenance Act for the year 1937 (R. 6, 8).

The Maintenance Tax Act levies a fee of $50.00 on trucks of a manufacturer's rated capacity of 1½-tons, $75.00 for trucks of a manufacturer's rated capacity of 2-tons in the event that the trucks are operated for hire and if operated not for hire the corresponding fees are $15.00 and $30.00, respectively. Trailers of a factory weight of 4,000 pounds are required to pay a fee of $50.00 for each trailer operated for hire and $30.00 if operated not for hire. (See Appendix, Sec. 3B, C, D, E, of this Act.) Manufacturer's rated capacity and factory weight have no relationship to the

actual weight of the vehicle and no relationship with respect to the use such vehicles would make of the highways because a truck of a rated capacity of one-ton may weigh far in excess of a truck of a rated capacity of two or three tons. Rated capacity differs greatly with the actual weight of the trucks. A 1½-ton tractor weighs far less than a 1½-ton straight truck. A combination of a tractor and trailer pays more than twice the fee required of a straight truck of approximately the same weight, even though the tractor-trailer unit would cause less wear and tear to the highways than would the straight truck, because of the concentration of weight (R. 4, 5).

There is a discrimination against carriers for hire in favor of carriers not for hire because the for hire trucks pay much larger fees than the not for hire trucks. There are 69,503 not for hire trucks operating over the highways of Georgia and only 2,943 for hire trucks and the vehicles operating not for hire travel more miles over the State highways than do the for hire trucks (R. 5). In addition to the larger fees required under the Maintenance Tax, for hire carriers are required to purchase the $25.00 Georgia Public Service tags while other trucks are exempt. The Georgia Public Service Commission has very little regulatory power with respect to interstate operations (R. 7, 8).

The taxes paid by the motor vehicle industry, exclusive of the Maintenance Tax, more than pays for the cost of maintaining and constructing the highways of the State. Last year the State collected $1,305,999.71 from the sale of $3.00 tags, and as required by statute $1,209,495.05 was paid to the State Highway Fund to be used for State-Aid Roads. The remainder was used for regulatory purposes, such as sheriff fees and expenses of the Revenue Commission (R. 6, 7).

The Georgia Public Service Commission collected $73,565.00 for registration fees from carriers for hire, and as required by the Motor Carriers Act of 1931 (Georgia Code,

1933, Sec. 68-623) $28,341.12 was paid into the Highway Fund for State-Aid Roads, the remainder being used to defray regulatory expenses of the Commission (R. 7).

The State collected $17,525,616.25 from the gasoline tax and under the statute two-thirds of this sum is required to be paid to the Highway Fund for State-Aid Roads (R. 8). The State Highway Department for the same year spent only $11,127,258.38 for highway construction and of the sum expended the Federal Government contributed $3,721,489.90 (R. 21). The motor vehicle industry paid sixty-two per cent. of the entire taxes collected by the State from all sources. Less than thirty per cent. of this revenue was spent for highway purposes (R. 10, 11).

Eleven per cent. of the entire mileage traveled by the Dixie Ohio Express Company is traveled within the boundaries of the State of Georgia. The State of Georgia collects far more than eleven per cent. of the total taxes paid by the appellant to all of the other six States through which it operates and if appellant were required to pay the same amount of taxes to the other States it would be unable to operate at a profit (R. 8, 9).

The affidavit of illegality alleged that the Maintenance Tax Act of 1937 is unconstitutional in that it violates the commerce clause of the Constitution of the United States and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States (R. 11, 12).

V. SPECIFICATIONS OF ERROR.

The Supreme Court of Georgia erred in holding:

(1) That the statute involved was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the appellant herein is a common carrier for hire engaged exclusively in interstate commerce, operating its vehicles over the State highways of Georgia and the statute levies a tax on the

appellant, the proceeds of which are used entirely for the maintenance of Rural Post Roads which appellant does not and can not use.

(2) That the statute involved herein was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the statute levied a tax which was graduated according to the manufacturer's rated capacity of trucks and the factory weight of trailers and was made applicable to the appellant, a common carrier for hire operating both types of vehicle exclusively in interstate commerce.

(3) That the statute involved herein was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that exclusive of the tax involved herein the appellant, a common carrier for hire engaged exclusively in interstate commerce, paid other license fees and the taxes for all vehicles operated in the State of Georgia, the combined total of which was more than sufficient to pay its proportionate share of the expenses of motor vehicle regulation and for its use of the highway.

(4) In holding that the statute herein involved was not unconstitutional as being repugnant to the commerce clause of the Constitution of the United States and also the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, the facts showing that the statute required a much higher tax on vehicles of the appellant, operated as a common carrier for hire exclusively in interstate commerce, than was required of identical vehicles not operated for hire, even though there are more than twenty times as many carriers operating not for hire as there are carriers operating for hire on the highways of the State of Georgia and that carriers for hire are required to pay other fees that are not exacted of carriers operating not for hire.

VI. SUMMARY OF ARGUMENT.

POINT A. The Maintenance Tax Act violates the commerce clause of the Constitution of the United States because it levies a flat tax on vehicles of the appellant, which are engaged exclusively in interstate commerce, the entire proceeds of which are used to construct and maintain highways which appellant does not and can not use.

POINT B. The Maintenance Tax Act is unconstitutional as applied to appellant because the tax prescribed thereby is graduated according to manufacturer's rated capacity and factory weight of the vehicles and bears no reasonable relationship to the use of the highway by appellant and therefore the tax constitutes a direct unreasonable burden upon the exclusively interstate business of appellant and as such is in violation of the commerce clause of the Constitution of the United States.

POINT C. The Maintenance Tax Act is in violation of the commerce clause of the Constitution of the United States because exclusive of the maintenance tax prescribed the appellant is required to pay other license fees and taxes which more than compensate the State for the expense of regulation and the costs of maintaining its highways and therefore the fees levied under the Maintenance Tax Act constitute a direct burden on the interstate business of the appellant.

POINT D. The Maintenance Tax Act levies a much higher tax on vehicles of the appellant which are operated for hire than upon identical vehicles not operated for hire, even though both types of vehicles are operating in interstate commerce and because of the different measure of fees required there results a discrimination against appellant in favor of carriers operating not for hire and further results in placing an unreasonable burden on the interstate business of the appellant, which is in violation of the equal protection clause of the Fourteenth Amendment to the Con-

stitution of the United States and the commerce clause of the Constitution of the United States.

VII. ARGUMENT AND AUTHORITIES.

POINT A.

The Allocation of the Proceeds of the Tax to Highways Which Appellant Can Not Use Is An Unconstitutional Burden On Interstate Commerce.

This court has numerous times held that the authority of a State to levy a tax on interstate motor vehicles is limited to two purposes, to-wit: (1) to defray the expenses of regulation under the State police power; and (2) to compensate for the privilege of using the highways of the State.

The Supreme Court of Georgia clearly construed the Georgia Maintenance Tax Act as falling within the latter purpose. *Dixie Ohio Express Company v. State Revenue Commission,* 186 Ga. —, 197 S. E. 887 at 889.

The legality of the fees levied under Section 3 of the Maintenance Tax Act can not be sustained as to the appellant if they are shown to be an unreasonable charge for the privilege of using the highways of Georgia. *Clark v. Poor,* 274 U. S. 554.

Prior to 1937 there were two classes of public roads in the State of Georgia: (1) State-Aid Highways composing a State Highway System(1) and (2) Rural Post Roads and secondary roads(2).

(1) Section 95-1701, Georgia Code, 1933. There is hereby created a system of State-Aid Roads for the purpose of inter-connecting the several county seats, which shall be designated, constructed, improved and maintained by the State through the State Highway Department, under the provisions of law; and the term "State-Aid Roads" shall include the State or interstate bridges and other subsidiary structures necessary or desirable in the construction of said roads.

(2) Section 95-102, Georgia Code, 1933. All roads used as post roads which are part of rural postal routes shall be deemed public roads, and it shall be the duty of the county commissioners or the ordinary, as the case may be, to construct and maintain said roads in a reasonably passable condition as other public roads of the county are maintained.

The former are the regularly traveled highways and are maintained by the State Highway Department, while the latter are under the control of the local county governments. The passage of the Maintenance Tax Act and the Rural Post Roads Act changed the system of highway maintenance of the rural roads to some extent.

Section 11 of the Maintenance Tax Act, 1937, Georgia Laws, 1937, page 166, allocates all moneys derived from the fees levied thereunder to the Director of the United States Rural Post Roads and further requires that the moneys shall be prorated according to the number of miles of rural post roads in the counties of the State.

The companion Act also passed in 1937 defines United States Rural Post Roads as all roads, not included in the present highway system, over which mail is carried. Georgia Laws, 1937, 912 at 914[3].

The trucks of appellant travel only over State-Aid Roads or highways known as a part of the State Highway System and do not operate a single mile over the Rural Post Roads as defined in the Post Roads Act (R. 8, 9).

It is impossible for the appellant to use the Post Roads of Georgia because its routes in the State of Georgia have been limited by the certificate granted to it by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act of 1935. (Title 49 U. S. C. A., Sec. 306) (R. 10).

The statute in the case at bar is identical in effect with the statute this court held unconstitutional in *Interstate Transit Company v. Lindsey,* 283 U. S. 183. In that case

(3) The term "Rural Post Roads" shall mean all roads and highways in the several counties of the State of Georgia over which U. S. mail is carried, not included in the present highway system. The term "Farm-to-Market Roads" in this Act shall mean all public roads and highways in the several counties of the State of Georgia, other than U. S. Post Roads and/or State-Aid Roads.

the Tennessee statute imposed a flat tax graduated according to carrying capacity of the vehicle. The tax was intended as a fee for the use of the highway. The Tennessee Act provided that the proceeds of the tax shall go into the general funds of the State. This tax was also imposed in addition to other motor vehicle fees. In holding such a flat tax based on carrying capacity violated the commerce clause of the Constitution, the court, at page 188, said:

> "The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting § 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the general funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the State highways and regulating motor traffic, it has been the consistent practice to prescribe that monies raised for this purpose shall be segregated and go into the Highway Fund."

The case at bar and the *Lindsey Case* are identical, except that in the *Lindsey Case* the proceeds of the tax went to the general funds of the State and in the case at bar the proceeds are allocated to a class of highways which this carrier does not and can not use. In neither case were the fees used for the benefit of the carrier involved and in both cases the tax could be supported only if it was a reasonable fee for the use of the highways. The tax in the case at bar can not be said to be a fee for the use of the highways when it is used for a purpose entirely foreign to the use this carrier makes or can make of the highways. As far as the appellant is concerned, the proceeds might well be placed in the general treasury fund. The purpose of the Maintenance Tax Act is to construct and maintain rural roads which are not traveled by the appellant. This is an at-

tempt by the legislature to make the interstate carriers pay for rural roads which were heretofore maintained by the local county governments. This scheme of the legislature is unconstitutional in that it places a direct burden upon the interstate business of the appellant and is in no way a charge for the use it makes of the highways of Georgia. This is particularly true when it is shown that appellant pays existing motor vehicle taxes sufficient to pay its proportional share of the expense of maintaining this system of State-Aid Roads.

In *Carley & Hamilton v. Snook,* 281 U. S. 66, an intrastate carrier attacked a California statute which imposed a tax on the carrier for the use of streets that the carrier did not use and in sustaining the validity of the tax Justice Stone indicated that such a tax would be invalid as to an interstate operator. At page 70 it was stated:

> "Appellants insist that the registration fees imposed by § 77 (b) and (c) are in effect tolls for the use of the highways maintained by the State * * *, and as they pay the license tax imposed by the cities for the use of city streets, the exaction of the additional 'tolls' with respect to highways outside of cities, which appellants in No. 86 do not use and which the appellants in No. 267 use less than the city streets, is a violation of the 14th Amendment.
>
> "This argument is based upon cases in this court arising, not under the 14th Amendment, but the commerce clause of the Constitution, where the tax assailed was levied by a State on interstate carriers and purported to be exacted for their use of the State highways."

POINT B.

Flat Fees Graduated According to Manufacturer's Rated Capacity or Factory Weight Constitute An Unreasonable Burden On Interstate Commerce.

Appellant recognizes that there are rulings of this court which have sustained motor vehicle license fees based on

carrying capacity or horsepower of the motor, but insists the case at bar is not governed by these decisions. This court sustained a license fee based on carrying capacity of the vehicle in *Hicklin v. Coney,* 290 U. S. 169, but the court pointed out the requisites of such a statute at page 173, as follows:

> "The State court held that the fees 'are collected, as provided for by § 8517, for the purpose of maintaining the *public highways over which such motor vehicles shall operate,* as compensation for their use.' The statute provides for the segregation, for this purpose, of the moneys collected."

There is no such provision in the Georgia Maintenance Tax Act and furthermore Section 11 thereof allocates the money collected to certain rural roads which appellant can not use. The maintenance tax is not designed as a fee for the use and construction of highways generally. The legislature apparently omitted such a provision intentionally. Section 11-a of the Maintenance Tax Act repeals Chapter 92-29 of the 1933 Georgia Code, which levied a mileage tax on carriers for hire, and the Act repealed contained a clear definition of its purpose by stating that the tax was imposed as a "fair contribution to the cost of the constructing and maintaining the highways of the State." Section 92-2922, Code, 1933.

The omission of a similar provision in the Maintenance Tax Act, coupled with the provision as to Rural Post Roads, shows that the tax is not a fee designed for maintaining and constructing the State highway system of roads. The companion Act passed at the same time as the Maintenance Tax Act, creating the U. S. Rural Post Roads Division, indicates that the purpose was to raise money to match appropriations from the Federal Govern-

ment in connection with the construction of Rural Post Roads. See Section 16 of the Act, page 917[4].

Rated capacity and factory weight have no direct bearing on the wear and tear a vehicle will cause the highway. The affidavit of illegality alleged that a 1½-ton straight truck causes more damage to the highway than does a 1½-ton tractor and a 4,000-pound trailer. This is because of the concentration of weight of the straight truck. A tractor-trailer unit of appellant can carry but 25 per cent. more freight than the straight truck, but is required to pay 150 per cent. more license fee (R. 5). Such inconsistent charges can not be said to constitute a reasonable measure for the use of the highway. See *Roadway Express v. Murray*, 60 Fed. (2d) 293, 294.

This measure of taxation on interstate carriers was condemned by the court in *Interstate Transit Company v. Lindsey*, supra, and at page 190 the proper measure was suggested by Mr. Justice Brandeis:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, can not be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra. In the present Act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with

[4] Be it further enacted, That if any provisions of this Act are inconsistent with or contrary to any rules, regulations or requirements of the Federal Bureau of Roads and/or other Federal agencies, the State Highway Board is hereby authorized and empowered to waive such provisions of this Act in order to meet any such rule, regulation, or requirement, it being the purpose of this Act to enable the Board to comply with any rule, regulation or requirement of the Federal Government in order to cooperate with the Federal Government and all its agencies to procure all possible Federal aid and assistance for construction and/or maintenance of U. S. Rural Post Roads and/or Farm-to-Market Roads.

the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity."

This court reasoned along similar lines in *Sprout v. South Bend*, 277 U. S. 163. The tax in that case was a flat tax based on the seating capacity of the vehicle and the language of the ordinance did not indicate that the proceeds of the tax were to be applied to the construction or maintenance of the city streets.

This court has sustained a flat fee in *Hicklin v. Coney*, supra, *Clark v. Poor*, supra, and *Hendrick v. Maryland*, 235 U. S. 610. However, in each of these cases the statute attacked was designed to defray the expenses *both* of police regulation and the maintenance of highways and there was no evidence that the fees exceeded the *dual* purpose for which they were imposed. The distinction between regulatory acts and taxes levied as compensation for the use of the highway was clearly pointed out in *Prouty v. Coyne*, 55 Fed. (2d) 289, 292. In that case a flat tax based on chassis weight was condemned.

The Supreme Court of Georgia and the appellee cite the case of *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U. S. 285, to sustain the constitutionality of the maintenance tax. It is true that the Motor Vehicle Act there involved levied a flat fee of $25.00 per vehicle on interstate carriers for hire, but that Act was construed by the Supreme Court of Georgia to be for the *dual* purpose of providing for police regulation and a fee for the use of the highways. *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 179 Ga. 431 (2), 176 S. E. 487. The graduated fees under the Maintenance Tax Act are now imposed in addition to the $25.00 fee heretofore levied for the purpose of regulation and highway maintenance. A straight mileage tax has been

approved as a proper method of taxation of interstate carriers for the privilege of using the highways. *Interstate Busses Corp. v. Blodgett,* 276 U. S. 245. A charge per ton mile is another reasonable method suggested in *Continental Baking Co. v. Woodring,* 286 U. S. 352.

In view of the existing motor vehicle taxes, the fee levied by the Maintenance Tax Act is beyond the legislative authority and constitutes a direct tax on the interstate business of the appellant without any reference to the use it makes of the highways of Georgia.

POINT C.

The Taxes Exacted Under Existing Motor Vehicle Statutes Exclusive of the Maintenance Tax Clearly Exceed the Cost of the Maintenance of the Highways and Thereby Render the Fees Prescribed Under the Maintenance Tax Act Unconstitutional.

The Maintenance Tax Act contains no regulatory provisions and is solely a revenue measure. It lays a direct tax on the appellant and can be sustained only as a reasonable fee for the use made of the highways. Under existing laws the appellant has paid a $3.00 license fee for each truck. Georgia Code, 1933, Section 68-211, as amended by Georgia Laws, 1935, page 157[5].

These license fees are allocated to the State Highway Department for the purpose of maintaining the State-Aid Roads. Section 94-1703, 1933 Georgia Code[6].

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(5) Schedule of annual fees for vehicles.—The annual fees for licensing the operation of the vehicles required by this chapter to be registered and licensed, shall be $3.00 for each such vehicle registered * * *.

(6) All funds realized from motor-vehicle licenses or fees, less the expense of collecting the same as provided by law, shall be deposited with the State Treasurer, to the credit of and as a part of the State-Aid Road fund, and said funds shall be controlled and disbursed under the provisions of this law.

Appellant has paid a license fee of $25.00 per vehicle, as required by Section 68-623 of the 1933 Georgia Code[7].

Under Section 6 of the Act to regulate public safety the appellant is required to purchase a $2.00 license for each chauffeur operating a vehicle for hire. Georgia Laws, 1937, page 346.

The fees so collected are used to pay the expenses of the safety regulation. Section 9 of the Safety Act, Georgia Laws, 1937, page 348.

Under the existing motor fuel law, purchasers of gasoline are required to pay a tax of six cents per gallon, four cents of which is used for the maintenance and construction of State-Aid Roads and one cent for county roads and the remaining other cent for school purposes. Georgia Laws, 1937, page 180[8]. The appellant purchased ap-

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(7) Every motor common carrier shall annually on or before January first, as long as such certificate remains in force, or before the vehicle is put into use, as to a vehicle put into use during the course of the year, make application to the Commission for registration of all motor vehicles to be operated under said certificate, in manner and form as the Commission may by rule or regulation prescribe, and shall pay to the Commission a fee of $25 for each vehicle for the registration of the same and the issuance of a permit or license to operate the same * * *. The money derived from the issuance and transfer of certificates and from the registration fee shall be subject to be used by the Commission for the administration and enforcement of this law, and any sum which may be left over and unexpended on the first day of January of each year shall be paid to the State Treasurer and shall be disbursed by him and paid to the State Highway Board for use in maintenance and repair of the highways as in the discretion of the Highway Board may be directed.

(8) (a) The proceeds of the six ($0.06) cents per gallon tax on motor fuel shall be paid to the State Treasurer and by him distributed as follows:

An amount equal to—

(1) Four ($0.04) cents per gallon shall be set aside to the State Highway Fund, for use in construction on the State Highway System of Roads, or State-Aid System of Roads; and

(2) One ($0.01) cent per gallon shall be set aside to be distributed to the several counties of the State to be used exclusively for the construction and maintenance of public roads; and

(3) One ($0.01) cent per gallon shall be set aside to the public schools of this State for an equalization fund.

proximately 90,000 gallons of gasoline in the State of Georgia in the year 1936 and thereby paid the State the sum of $5,400.00 (R. 8).

Exclusive of the maintenance tax the appellant has paid the State of Georgia approximately $8,500.00 per year in motor vehicle fees and under the present Maintenance Tax Act will be required to pay in addition approximately $6,000.00 per year. Such amounts far exceed a reasonable fee for the use appellant makes of the highways of Georgia (R. 7, 8).

Less than eleven per cent. of its total mileage is traveled in Georgia and if the taxes of the other States were the same, it could not continue to operate (R. 9). If the Georgia tax is sustained it opens the way for the other States in which appellant operates to exact the same fees and thereby destroys an interstate transportation business. A State can not prohibit an interstate operation but if this statute is sustained, it enables a State to do indirectly what it can not do directly.

Under the motor vehicle laws existing before the Maintenance Tax Act was passed, the State of Georgia collected funds far in excess of the amounts it has expended for the regulation of motor carriers and for the maintenance and construction of its highways. In 1936 $1,305,999.71 was collected from the sale of the $3.00 tags, of which 97 per cent. was expended for State-Aid Roads and three per cent. for regulatory purposes. $73,565.00 was collected from carriers for hire from the $25.00 Public Service Commission licenses, of which $46,000.00 was expended for regulation and $28,000.00 was transferred to the Highway Fund for the benefit of State-Aid Highways (R. 7). For the same year the State collected a total of $17,525,616.25 in gasoline taxes and four cents of each six cents collected should have been expended on State-Aid Highways (R. 8).

From these motor vehicle taxes the State collected over $18,000,000.00, which amounted to 62 per cent. of the total revenue collected by the State. For the same year, the State spent only $11,127,258.30 for highway maintenance and construction and of this sum expended the Federal Government contributed $3,721,489.90 (R. 10, 11, 21).

Taxes existing before the passage of the Maintenance Tax Act more than paid for the cost of regulation and highway maintenance and construction. The difference between the taxes collected and the amounts expended for highway purposes shows that a large part of the taxes was diverted to purposes other than highway maintenance and had there been no diversion there would have been available an additional $10,000,000.00 for highway purposes. The Congress has provided that only States which use the funds derived from motor vehicle taxes for road construction purposes shall be entitled to receive their full proportion of Federal Highway Aid. Title 23 U. S. C. A., Sec. 55, 48 Stat. 995. Cf. *Opinion of the Attorney-General of the United States, Volume 39, Opinion 43, April 18, 1938.*

In the recent case of *Ingels v. Morf,* 300 U. S. 290, this court held invalid a State motor vehicle Act on the ground that a State can not exact greater fees than the cost of the services rendered. In that case a flat fee of $15.00 was imposed on vehicles being towed into the State for the purpose of sale and it was provided that the proceeds of this tax were to be used to defray the expenses of regulation. The evidence indicated the amount of money received from this tax would far exceed the cost of the regulation, and at page 297 it was stated:

> "We can not say that the evidence does not support the conclusion of the trial court that the cost of policing would be amply met by a license fee of one-third of the amount so charged. The administrative expense of issuing the permits appears not to have been included, but the testimony that that expense was about

> $5.00 per car does not bridge the arithmetical gap, and does not impeach the court's conclusion that the permit fee bears no reasonable relation to the total cost of regulation, to defray which it is collected. It rightly held that the licensing provisions of the statute impose an unconstitutional burden on interstate commerce."

The case at bar is even stronger, for under existing laws reasonable compensation for the use of the highway has been paid and therefore the additional fees levied by the Maintenance Tax Act became a direct tax on the privilege of doing an interstate business and as such violates the commerce clause of the Constitution of the United States.

POINT D.

The Different Measure of Fees Discriminates Against Carriers for Hire and In Favor of Carriers Operating Not for Hire in Violation of Both the Commerce Clause and the Equal Protection Clause of the Constitution of the United States.

Under the Maintenance Tax Act the 1½-ton truck operating for hire is required to pay a $50.00 license fee, whereas the same type truck operating not for hire pays $15.00. The corresponding fees for a two-ton truck are $75.00 and $30.00 respectively. Fees for trailers are on approximately the same ratio (R. 4).

There is no justification for the much higher rate upon the for hire operator. It can not be said that the not for hire carrier requires less regulation and therefore the classification is reasonable because the question of regulation of the two-type carriers has been provided for in another motor vehicle statute which requires the for hire carriers to pay $25.00 per truck for a Georgia Public Service tag which is not required of the carriers operating not for hire. See Sections 68-601 (e) and 68-623 of the 1933 Code. *Aero Mayflower v. Georgia Public Service Commission,* supra.

Under the Public Safety Act for hire operators must pay $2.00 for a chauffeur's license and not for hire operators $1.00. Sections 6 and 8, Georgia Laws, 1937, pages 346 and 347. The only license fee required of a truck operating as a not for hire carrier is the $3.00 license fee (R. 22).

The Maintenance Tax Act is a revenue measure and contains no regulatory provisions and as applied to the appellant or other interstate operators it can be sustained only if it is a reasonable charge for the use made of the highways.

In *Aero Mayflower Transit Company v. Georgia Public Service Commission,* supra, it was stated at page 289 of the U. S. Report:

> "The fee is for the privilege for a use as extensive as the carrier wills that it shall be."

Here appellant can not "will" to use post roads, because its Federal permit is limited to other roads. Therefore, the difference in the amount of tax can not be justified by saying that the carriers operating not for hire use the highways less than the carriers operating for hire. This is particularly true in this case when the record shows that there are 69,503 trucks operating over the highways of Georgia not for hire and there are only 2,943 trucks operated for hire (R. 5). In addition, the use of the highways is now limited by the Interstate Commerce Commission (R. 10).

The Supreme Court of Georgia held that it was proper for the State to classify carriers into two groups, for hire and not for hire, and levy a higher tax on the former. *Dixie Ohio Express Company v. State Revenue Commission,* 197 S. E. 887 at 890. The Georgia court overlooked the fact that the appellant was engaged in interstate commerce and that the power of the State was limited to levying a fee commensurate with the privileges granted.

In the case of *Interstate Transit Company v. Lindsey*, supra, this court answered the argument of the Georgia court by stating at page 190:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, can not be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra. In the present Act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity."

The statute challenged herein contains no regulatory provisions and allocates all of the proceeds of the tax to the maintenance of Rural Post Roads and therefore as applied to interstate carriers, either for hire or not for hire, the fee charged must be a reasonable charge for the privilege of using the highways or it violates the commerce clause of the Constitution.

Under this statute a truck with the same rated capacity as a truck of the appellant may operate over the same route as the appellant and pay a much smaller fee than appellant, even though both are engaged in interstate commerce. Can it be said that the fees are commensurate with the use of the highway when the use is identical? Either the fees are too large for the for hire trucks or too low for the ones operating not for hire. The language used by Justice Brandeis in the case of *Sprout v. South Bend*, 277 U. S. 163, at page 170, is equally applicable to the present situation. It was there stated:

"A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

The maintenance tax levied on appellant is either an unreasonable fee for the use of the highway and thereby violates the commerce clause of the Constitution of the United States or it discriminates against the appellant and in favor of operators not for hire using the same type vehicles as appellant and is thereby in violation of the equal protection clause of the Constitution of the United States.

CONCLUSION.

WHEREFORE, it is respectfully submitted that the Maintenance Tax Act of 1937 is unconstitutional and void as being repugnant to the commerce clause of the Constitution of the United States and of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and the decision of the Supreme Court of Georgia should be reversed.

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APPENDIX.

Motor-Buses, Trucks, Trailers—Maintenance Tax and Registration.

(*Ga. Laws, 1937, p. 155*).

An Act to provide for the levy of a tax to be known as a Maintenance Tax to be paid by owners of motor-buses, trucks, and/or trailers operating over the public roads of this State; to repeal Chapter 92-29 of the Georgia Code of 1933, "Motor Carriers for Hire," pertaining to an annual or a mileage tax to be paid by motor carriers for hire; to provide a schedule of rates to be paid; to provide a date upon which said tax will become effective; to provide for the registrations of all motor-buses, trucks and/or trailers affected by this Act with the Director of the Motor Vehicle Division of the State Revenue Commission in the manner that applications and registrations of all motor vehicles are now made; to provide for owners of said vehicles to make oath as to factory weights of same upon registration; to provide for one-half of the tax where vehicles are registered after August 1st up to December 31st, of each year; to provide a penalty for failure to register; to provide that a maintenance tag shall be procured from the Director of the Motor Vehicle Division of the State Revenue Commission upon the payment of the tax herein levied, and to provide for the issuance of a maintenance tag to persons registering under this Act; to provide that the Director of the Motor Vehicle Division of the State Revenue Commission shall not issue a tag until the maintenance tax herein provided for has been paid; to provide for the design of the maintenance tag to be issued upon the payment of tax herein provided; to provide that resident and non-resident owners of such vehicles shall register and pay the tax when making more than two (2) trips in the State from out of the State each month, except where seasonable agricultural

products are hauled; to provide for the allocation of the funds derived from this tax to the United States Rural Post Roads Division of the State Highway Department of Georgia; to provide a saving clause in case any portion of this Act be declared unconstitutional; to provide for the punishment of any person violating the terms of this Act; to provide that said Act shall become effective April 1, 1937; to provide for the exemption of certain trucks and buses from the payment of this tax; to repeal all laws and parts of laws in conflict with this Act, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, That from and after the passage of this Act, all persons, firms, corporations, or associations holding title to a motor-bus, truck and/or trailer or having exclusive right to the use thereof for a period of more than thirty (30) days, shall pay a maintenance tax for the operation of such motor-bus, truck, and/or trailer upon and over the public roads of this State, according to the schedule hereinafter provided. The maintenance tax herein provided for shall be in addition to any and all other taxes, license, or registration fees now required under existing laws. Provided, that nothing in this Act shall apply to trucks and buses owned and operated by any political subdivision of this State and used exclusively in its governmental functions. Provided, further, that this Act shall not apply to motor vehicles engaged exclusively in transporting school children and school teachers to and from public schools nor to buses or other motor vehicles operated on fixed routes wholly within the corporate or police limits of municipalities and their environs and/or in connection with the operation of which a franchise or occupational tax is required to be paid to such municipalities. Provided, further, that this Act shall not apply to carriers operating over a route of not more than twenty miles in length and solely between a point in this State and a point within a United States

Military Reservation in this State under special franchise granted by the United States War Department.

Section 2. Be it further enacted by the authority aforesaid, That for the purpose of this Act the following definitions shall apply:

A. Motor-Bus. Any passenger carrying motor vehicle having a passenger seating capacity of eight (8) or more persons.

B. Trucks. A motor-vehicle for the transportation of property, which shall include any self-propelled vehicle designed for use as a traveling power plant or for drawing other vehicles but having no provision for carrying loads independently, except what are commonly known as farm tractors.

C. Trailer. Any vehicle without motive power, designed for carrying persons or property either partially or wholly on its own structure and for being drawn by a self-propelled vehicle and operated over the public roads of this State; that trailer in this Act does not mean trailers used for small luggage or boats.

Section 3. Be it further enacted by the authority aforesaid, That the annual maintenance tax for operation of motor-buses, trucks and/or trailers over the public roads of this State shall be as follows for each vehicle hereinafter named:

A. For each passenger carrying motor-bus the following sums, to-wit:

(This schedule is omitted as not applicable).

B. For each non-passenger carrying motor vehicle or truck not used as a common or contract carrier for hire, the following sums, to-wit:

1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity .....$ 5.00

2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity 10.00
3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity 15.00
4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity 30.00

(The higher brackets are omitted as not being relevant).

C. For each non-passenger carrying motor vehicle or truck used either as a common or contract carrier for hire, the following sums, to-wit:

1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity .....$ 10.00
2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity 20.00
3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity 50.00
4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity 75.00

(The higher brackets are omitted as not being relevant).

D. For each trailer or semi-trailer not used as, or in connection with a non-passenger carrying motor vehicle or truck used as a common or contract carrier for hire the following sums, to-wit:

1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight .....$ 5.00

2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 2,000 pounds factory weight 10.00
3. For each trailer or semi-trailer exceeding 2,000 pounds but not more than 3,000 pounds factory weight 20.00
4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight 30.00
5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 40.00
6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight 50.00

(The higher brackets are omitted as not being relevant).

E. For each trailer or semi-trailer used as, or in connection with, a non-passenger carrying motor vehicle or truck used as common or contract carrier for hire, the following sums, to-wit:

1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight .....$ 10.00
2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 1,500 pounds factory weight 20.00
3. For each trailer or semi-trailer exceeding 1,500 pounds but not more than 3,000 pounds factory weight 30.00
4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight 50.00
5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 75.00
6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight 100.00

(The higher brackets are omitted as not being relevant).

Provided that all motor drawn hearses or ambulances shall not be included in any of the above schedules but shall pay annually the sum of $25.00 for each of such hearses or ambulances.

12. Providing that nothing in this Act shall be construed to allow what is known as four-wheel trailers to operate on highways of this State after September 30, 1937, unless air brakes or hydraulic brakes are provided.

Section 4. Be it further enacted by the authority aforesaid, That the maintenance tax herein provided for shall become due and payable April 1, 1937, for the year 1937, Provided, however, that no person, firm, corporation or association subject to the payment of this tax shall be required to pay more than three-fourths (¾) of the amounts herein provided for the year 1937.

Section 5. Be it further enacted by the authority aforesaid, That the owners of motor-buses, trucks and/or trailers, shall, on or before the first day of May of the year 1937, and before they shall operate such motor-buses, trucks, and/or trailers, register such vehicle or vehicles in the office of the Director of the Motor Vehicle Division of the State Revenue Commission and obtain a maintenance tag to operate the same for the year 1937. That the application for registration of such vehicle shall be made to the Director of the Motor Vehicle Division of the State Revenue Commission upon blanks prepared by him the same as now required for the registry of motor vehicles where application is made for license or identification tags; Provided, however, that it shall not be necessary after the year 1937 for any person, firm, corporation, or association subject to the tax herein provided to have to register said vehicle except as is now provided for application and registration for the purpose of obtaining a license or identification tag.

Provided, however, that owners upon registration of said vehicles shall make oath before some officer authorized to administer oaths in this State, setting forth the correct factory weight or rating of said vehicle.

Section 6. Be it further enacted by the authority aforesaid, That any person, firm, corporation or association registering any of the said above-named vehicles between the dates of August 1 and December 31 of any year, shall not be required to pay more than one-half of the annual tax herein provided for.

Section 7. Be it further enacted by the authority aforesaid, That any person, firm, corporation, or association failing to pay the tax herein provided within thirty (30) days after same is due and payable, shall pay a penalty of twenty per cent. (20%) for said failure to register said vehicle as is required.

Section 8. Be it further enacted by the authority aforesaid, That beginning January 1, 1938, all persons, firms, corporations or associations subject to the tax herein provided for shall apply for and obtain a maintenance tag on or before the first day of February in each year thereafter and the payment of said maintenance tax shall be required of those subject to the tax at the time that said vehicle is registered with the Director of the Motor Vehicle Division of the State Revenue Commission for payment of license tag fee, and it shall be the duty of said Director to first collect the maintenance tax before issuing a license tag on the application made for registration for a license tag; and it shall be unlawful for said Director to issue a license tag to any person, corporation, firm or association until the maintenance tax herein provided for shall have been paid in full.

Section 9. Be it further enacted by the authority aforesaid, That upon application and registration for license tag for operation of any of the vehicles herein named, payment

of the maintenance tax shall be then and there made, and the Director of the Motor Vehicle Division of the State Revenue Commission shall issue a maintenance tag to person or persons paying said tax which maintenance tag shall have inscribed thereon the words, "Maintenance Tag," and the year for which said tax is paid. Said maintenance tag shall be oval or oblong in shape and not more than three (3") inches in diameter, and shall follow the same color scheme of the license tags for the year in which it is sold.

Section 10. Be it further enacted by the authority aforesaid, That all persons, firms, corporations or associations, whether resident or nonresident of this State making or causing to be made by or through any of their agents, servants or employees more than two (2) trips per month into this State with any of the vehicles herein named shall be liable to and shall pay the tax herein provided for except that any of the named vehicles named herein shall be allowed a maximum of ten (10) trips per month into this State for the purpose of hauling seasonable agricultural products grown in this State without payment of the tax herein provided for.

Be it further enacted, That any person, firm, corporation or association found to be operating any vehicle herein named upon the highways of this State contrary to the provisions of this section shall, in addition to any and all other penalties that may be now or hereafter imposed, be required to pay immediately the tax herein provided for such vehicle.

Section 11. Be it further enacted by the authority aforesaid, That any and all moneys derived from the sale of maintenance tags shall be and the same are hereby allocated to the United States Rural Post Roads Division of the State Highway Department of Georgia, to be expended through the Director thereof, and the said moneys shall be prorated among the several counties of this State accord-

ing to the number of miles of Rural Post Roads in said counties.

Section 11-A. Be it further enacted, That Chapter 92-29, including sections 92-2901 through 92-2926, "Motor Carriers for Hire," of the Georgia Code of 1933, pertaining to an annual or a mileage tax to be paid by motor carriers for hire, be and is hereby repealed.

Section 12. Be it further enacted by the authority aforesaid, That should any of the provisions of this Act be held illegal or unconstitutional, the same shall not vitiate the remaining provisions of said Act, but all such provisions not held illegal or unconstitutional shall remain in full force and effect.

Section 13. Be it further enacted by the authority aforesaid, That all persons, firms, corporations or associations violating the terms of this Act shall be guilty of a misdemeanor and shall be punished as such.

Section 14. Be it further enacted by the authority aforesaid, That this Act shall not take effect until April 1, 1937.

Section 15. Be it further enacted, That the State agency having the duty to collect the taxes herein provided for is authorized and empowered to furnish to its employees collecting or enforcing said taxes such weighing devices as necessary to enforce this Act, and all persons employed to enforce this Act are hereby authorized to stop and/or weigh any truck and/or trailer and/or bus, using any public road of this State.

Section 16. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved March 30, 1937.